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ALEXANDER L. STEVAS

No. 84-1235

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. WATERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated by the admission of testimony of a convicted accomplice who may have expected a more favorable sentence reduction recommendation if his cooperation resulted in future indictments.

2. Whether petitioner's due process rights were violated because the district court's denial of his motion for post-conviction relief under 28 U.S.C. 2255 was affirmed by an equally divided en banc court.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Benson v. *United States*, 146 U.S. 325 8

Berlin v. *E.C. Publications, Inc.*, 329 F.2d 541, cert. denied, 379 U.S. 822 13

Biggers v. *Tennessee*, 390 U.S. 404 12

Briscoe v. *Commonwealth Bank of Kentucky*, 33 U.S. (8 Pet.) 118 13

Fugate v. *New Mexico*, No. 83-6663 (Mar. 26, 1985) 12, 13

Green v. *Zant*, No. 84-5609 (A-503) (Jan. 7, 1985) 12, 13

Hertz v. *Woodman*, 218 U.S. 205 13

Hoffa v. *United States*, 385 U.S. 293 8

Koehler v. *Engle*, No. 83-1 (Mar. 26, 1984) 12, 13

Lisenba v. *California*, 314 U.S. 219 8

Mabry v. *Johnson*, No. 83-328 (June 11, 1984) 12

Oklahoma v. *Castleberry*, No. 83-2126 (Apr. 1, 1985) 12, 13

Page

Cases—Continued:

Ramirez v. *Indiana*, No. 84-5059 (Apr. 1, 1985) 12, 13

Rosen v. *United States*, 245 U.S. 467 8

United States v. *American-Foreign Steamship Corp.*, 363 U.S. 685 13

United States v. *Baresh*, 595 F. Supp. 1132 7

United States v. *Clavey*, 578 F.2d 1219, cert. denied, 439 U.S. 954 13

United States v. *Crim*, 340 F.2d 989 9

United States v. *Curtis*, 520 F.2d 1300 9

United States v. *Dailey*, 589 F. Supp. 561, appeal pending, No. 84-1578 (1st Cir.) 7

United States v. *D'Antignac*, 628 F.2d 428, cert. denied, 450 U.S. 967 9

United States v. *Frady*, 456 U.S. 152 12

United States v. *Geders*, 585 F.2d 1303, cert. denied, 441 U.S. 922 12-13

United States v. *Grimes*, 438 F.2d 391, cert. denied, 402 U.S. 989 9

United States v. *Jones*, 575 F.2d 81 9

United States v. *Lane*, 693 F.2d 385 9

United States v. *Lemm*, 680 F.2d 1193, cert. denied, 459 U.S. 1110 ..... 3, 7, 11

United States v. *Librach*, 536 F.2d 1228, cert. denied, 429 U.S. 939 9

Page

Cases—Continued:

United States v. *Lightly*, 677 F.2d 1027 12

United States v. *Murphy*, 41 U.S. (16 Pet.) 203 8-9

United States v. *Penn*, 647 F.2d 876 13

United States v. *Reynoso-Ulloa*, 548 F.2d 1329, cert. denied, 436 U.S. 926 9

United States v. *Spivey*, 448 F.2d 390, cert. denied, 405 U.S. 927 9

United States v. *Thompson*, 728 F.2d 654, cert. denied, No. 83-6501 (Oct. 1, 1984) 12

United States v. *Valle-Ferrer*, 739 F.2d 545 9

United States v. *Walker*, 720 F.2d 1527, cert. denied, No. 83-6271 (Mar. 19, 1984) 9

Washington v. *Texas*, 388 U.S. 14 7

Western Pacific R.R. Corp. v. *Western Pacific R.R. Co.*, 345 U.S. 247 13

Constitution, statutes and rules:

U.S. Const. Amend. V (Due Process Clause) 6

18 U.S.C. 1341 2

28 U.S.C. 2255 ..... 2, 5

Fed. R. Crim. P. 35 5

Fed. R. Evid. :

Rule 402 8

Rule 601 8

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OPINIONS BELOW

The opinion of the court of appeals panel (Pet. App. 1a-13a) and the judgment order of the en banc court of appeals (Pet. App. 14a-15a) are reported at 732 F.2d 1527. The memorandum opinion of the district court is unreported. Earlier opinions of the court of appeals on petitioner's direct appeal are reported at 704 F.2d 1014 and 716 F.2d 482.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 14a-15a) was entered on September 20, 1984. A petition for rehearing was denied on November 2, 1984 (Pet. App. 16a). The petition for a writ of certiorari was filed on January 31, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to consecutive terms of two years' imprisonment on each count. The court of appeals affirmed petitioner's convictions on four of the counts. 704 F.2d 1014 (1983). Petitioner subsequently filed a motion for post-conviction relief under 28 U.S.C. 2255. The district court denied the Section 2255 motion, and, after a panel of the court of appeals had reversed, the en banc court of appeals affirmed the judgment of the district court by an equally-divided vote (Pet. App. 14a-15a).

1. The evidence at trial showed that petitioner, a real estate agent, participated in an arson-for-profit scheme conducted in Omaha, Nebraska, from 1976 through 1978. The scheme was orchestrated by Eugene Gamst, a public insurance adjuster. In May 1980, Gamst entered into a plea agreement with the government and became the principal prosecution witness against his co-conspirators. In exchange for Gamst's cooperation and his guilty plea to racketeering, mail fraud, and Travel Act charges, the government agreed to dismiss the remaining charges against him and to "acknowledge [Gamst's] cooperation by way of truthful testimony" at the time he was sentenced (Gov't C.A. Br., App. A, Exh. 1).[1] Gamst agreed to "testify truthfully and completely in all further proceedings concerning this case" (*ibid.*).

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[1]"Gov't C.A. Br." refers to the brief filed by the government in the court of appeals in No. 83-2159, the appeal from the denial of petitioner's Section 2255 motion.

Gamst initially testified against several of the participants in the arson-for-profit scheme other than petitioner. See *United States* v. *Lemm*, 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983).[2] During the course of the *Lemm* trial, Gamst testified that petitioner located houses that could be purchased and burned (Gov't C.A. Br. 8, App. A, Exh. 3). Following the completion of the *Lemm* trial, Gamst was sentenced to 12 years' imprisonment.

The government then contacted Gamst's attorney concerning Gamst's further cooperation in follow-up cases. On December 16, 1980, Gamst's counsel sent a letter to the prosecutor setting forth his understanding "that if Mr. Gamst cooperates in the Grand Jury investigation of certain individuals and if charges are brought against those persons," the government would "[a]ffirmatively recommend" that his sentences be reduced by two years (Pet. App. 4a n.1). However, "[i]n the event Mr. Gamst cooperates, and no charges are brought," Gamst's counsel understood that the prosecutor would "inform the Court of Mr. Gamst's cooperation" but would not make "any actual recommendation of a reduced sentence" (*ibid.*). In either event, Gamst's counsel understood that the prosecutor would make Gamst's future cooperation known to the parole commission (*ibid.*). On December 18, 1980, the prosecutor replied, stating only that the government would acquiesce in a recommendation of a two-year reduction in Gamst's sentence based on his "further cooperation by way of truthful testimony" (Pet. App. 5a). The prosecutor concluded by stating, "[a]gain, all that we would request would be [Gamst's] truthful testimony concerning his recollections of these matters" (Gov't C.A. Br., App. A, Exh. 6).

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[2]Petitioner did not become a suspect until late in the *Lemm* investigation and therefore was not indicted with the *Lemm* defendants.

2. Petitioner subsequently was indicted on five counts of mail fraud in connection with the arson-for-profit scheme. At petitioner's trial, Gamst testified that after the two men met in the spring of 1976, petitioner agreed to locate and finance properties suitable for arson. Gamst testified that petitioner helped him in arranging four fires and that petitioner arranged a fifth fire on his own. On cross-examination, petitioner's counsel impeached Gamst thoroughly with evidence of his agreements with the government (I Tr. 135-142, 150-155, 201-202, 270-275, 286-288, 290-302). Peggy O'Brien, one of Gamst's accomplices, corroborated much of Gamst's testimony concerning petitioner's involvement in the first four fires (see, *e.g.*, II Tr. 427-435, 438, 442-445, 454, 459-465, 474-475). Another witness, Phillip Dahl, testified that petitioner and Gamst twice solicited Dahl to stage a fire (II Tr. 524-527). Yet another witness, Delores Skelton, testified about petitioner's involvement in one arson-for-profit episode (II Tr. 573-574). Petitioner was convicted on all counts.

The court of appeals affirmed petitioner's convictions on four of the counts. 704 F.2d 1014 (1983). The court of appeals rejected petitioner's claims that the district court should have ordered production of certain summaries of FBI notes and that no reasonable person could have believed Gamst's testimony. The court noted that determination of witness credibility is a matter for the jury and that other witnesses had confirmed Gamst's testimony about petitioner's role in the scheme. *Id.* at 1017. The court of appeals reversed petitioner's conviction on the fifth count on the ground that the government had failed to produce evidence that one of the fires resulted from arson.

Petitioner filed a petition for rehearing in which he contended for the first time that the cooperation agreement between Gamst and the government violated due process.

The court of appeals denied the petition without prejudice to presentation of the claim to the district court pursuant to 28 U.S.C. 2255 or Fed. R. Crim. P. 35. 716 F.2d 482 (1983).

3. Petitioner subsequently filed a motion under 28 U.S.C. 2255, alleging that he was entitled to post-conviction relief because Gamst's testimony against him had been secured by means of an unconstitutional "contingent" cooperation agreement with the government. Following a hearing, the district court denied petitioner's motion. The court construed the post-sentencing agreement between Gamst and the government as according more favorable treatment to Gamst if his cooperation led to further indictments (Aug. 17, 1983, Order, at 2). The court concluded, however, that there had been no violation of due process, because (1) the agreement was read to the jury in open court; (2) Gamst was thoroughly cross-examined about the nature of his agreement with the government; and (3) the possibility of a recommendation for reduction of sentence was not discussed until after Gamst had provided information concerning other participants in the arson scheme and had indicated his willingness to testify (*id.* at 3-4). The court further concluded that, even if Gamst's testimony were disregarded, there was sufficient independent evidence to support petitioner's convictions (*id.* at 4).

A panel of the court of appeals reversed (Pet. App. 1a-13a). Although the panel recognized that agreements to provide favorable treatment in exchange for truthful testimony were not per se illegal, it concluded that "the government cannot consistent with due process offer favorable treatment to a prosecution witness contingent upon the success of the prosecution" (*id.* at 8a). The panel rejected the government's contention that it was the jury's role to determine the credibility of witnesses and that the thorough cross-examination of Gamst allowed the jury to weigh

Gamst's testimony in light of his agreement with the government (*id.* at 10a-11a).

The government filed a petition for rehearing with a suggestion for rehearing en banc. On July 3, 1984, a majority of the judges who were eligible to vote granted the government's request for en banc consideration. On September 20, 1984, the en banc court issued an order affirming the judgment of the district court by an equally divided vote (Pet. App. 14a-15a). Chief Judge Lay, a member of the original panel, did not participate in that vote because of illness.

ARGUMENT

The court of appeals' affirmance without opinion of the district court's denial of post-conviction relief lacks precedential value because it was rendered on an equally divided vote of the en banc court; the decision therefore lacks continuing importance. In any event, the unreported opinion of the district court is correct and does not conflict with any decision of this Court or any court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner contends (Pet. 3-7) that the district court was required to exclude Gamst's testimony because the contingent cooperation agreement between Gamst and the government tainted the integrity of the truthfinding process.[3] That contention is flatly inconsistent with well-established principles governing the competency of witnesses. The Due Process Clause does not bar testimony

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[3]Both the district court and the court of appeals panel, apparently relying on the letter from Gamst's counsel to the prosecutor following Gamst's sentencing, concluded that Gamst and the government entered into a cooperation agreement that was contingent on further indictments. See Aug. 17, 1983, Order, at 2; Pet. App. 4a-6a, 9a. We believe, however, that this is plainly an incorrect characterization of the agreement. The prosecutor's reply of December 18, 1980, did not refer to any contingency other than Gamst's provision of truthful testimony. See

pursuant to a contingent cooperation agreement, so long as the substance of the agreement is disclosed to the defendant before trial and defense counsel has a full opportunity to cross-examine the witness about the terms of the agreement. And even if there ever were circumstances in which that was not so, it is clear under the circumstances of this case that the cooperation agreement between Gamst and the government provided no basis for disqualifying Gamst as a witness at petitioner's trial.

At common law testimony by accomplices and other interested persons was routinely disqualified on the ground that "erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." *Washington* v. *Texas*, 388 U.S. 14, 21 (1967) (footnote omitted). That practice eroded over time and has now been firmly rejected in favor of a rule that permits the jury to decide on the credibility and weight of testimony in light of

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id. at 5a. The United States does not ordinarily enter into cooperation agreements that are contingent on indictments or convictions, since such agreements invite damaging cross-examination. Here the government would have had little incentive to execute a contingency agreement, since Gamst's testimony in the *Lemm* trial already supplied probable cause for the indictment of petitioner. See page 3, *supra*.

The petition confirms the point that contingency agreements are not common in the federal system. In three of the five federal cases cited at Pet. 7 n.5, the court found that the cooperation agreement was non-contingent. The agreement in a fourth case, *United States* v. *Baresh*, 595 F. Supp. 1132 (S.D. Tex. 1984), was drafted by state prosecutors. The district court in *United States* v. *Dailey*, 589 F. Supp. 561 (D. Mass. 1984), appeal pending, No. 84-1578 (1st Cir.), found the cooperation agreements in that case to be contingent on successful prosecutions. We believe that conclusion is erroneous. The agreements in *Dailey* referred only to "value" or "benefit" to the government from the witnesses' cooperation. *Id.* at 565-566, 567. As we explain in our court of appeals brief in that case, each of the witnesses testified in a related proceeding that he did not understand his agreement with the government to be contingent on successful prosecutions.

all relevant factors. The modern practice rests on the recognition that

> the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent * * *.

Rosen v. *United States*, 245 U.S. 467, 471 (1918). See also *Washington* v. *Texas*, 388 U.S. at 22. The Federal Rules of Evidence incorporate the modern rule. See Fed. R. Evid. 402 ("[a]ll relevant evidence is admissible," except as otherwise provided); Fed. R. Evid. 601 ("[e]very person is competent to be a witness," except as otherwise provided). See also Advisory Committee note to Fed. R. Evid. 601 (rule represents a "general ground-clearing [that] eliminates all grounds of incompetency not specifically recognized" by other rules, including "connection with the litigation as a party or interested person").

In applying the modern rule, federal courts have routinely concluded that testimony obtained in exchange for a promise of favorable treatment is admissible. Such testimony does not raise due process concerns, despite the fact that the witness has an obvious incentive to lie. This Court has explained that the existence of such an incentive does not render testimony "constitutionally inadmissible," since "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). See also *Lisenba* v. *California*, 314 U.S. 219, 227 (1941); *Benson* v. *United States*, 146 U.S. 325, 334-337 (1892); *United States* v. *Murphy*, 41

U.S. (16 Pet.) 203 (1842) (owner of stolen goods was a competent witness despite his eligibility to receive a portion of the fine upon conviction). The courts of appeals likewise have held that there is no violation of fundamental fairness merely because an accomplice testifies as a government witness in exchange for a promise of favorable treatment. See, *e.g.*, *United States* v. *D'Antignac*, 628 F.2d 428, 435-436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975); *United States* v. *Spivey*, 448 F.2d 390, 391 (4th Cir. 1971), cert. denied, 405 U.S. 927 (1972).

In addition, courts of appeals have held admissible the testimony of informant-witnesses who have received fees contingent on the value of their services. Although such fee arrangements may create an incentive to lie, the courts have recognized that "there are strong public policy justifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes." *United States* v. *Walker*, 720 F.2d 1527, 1540 (11th Cir. 1983), cert. denied, No. 83-6271 (Mar. 19, 1984). Rather than excluding such testimony on a case-by-case basis, the courts have found it preferable to "leave the entire matter to the jury to consider in weighing the credibility of the witness-informant." *United States* v. *Grimes*, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971). See also, *e.g.*, *United States* v. *Valle-Ferrer*, 739 F.2d 545, 546-547 (11th Cir. 1984); *United States* v. *Lane*, 693 F.2d 385, 387-388 (5th Cir. 1982); *United States* v. *Jones*, 575 F.2d 81, 85-86 (6th Cir. 1978); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 & n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978); *United States* v. *Crim*, 340 F.2d 989 (4th Cir. 1965).

There is no basis for treating contingent cooperation agreements differently from agreements involving accomplice testimony or contingent fee arrangements. Any cooperation agreement is likely to have some element of contingency, since prosecutors normally would not agree to refrain from pursuing charges unless they could obtain some assurance that the witness was prepared to provide valuable evidence. If the government agrees to advise the sentencing court or parole authorities of the extent of the witness's cooperation, common sense suggests that such a recommendation will be more valuable if the cooperation has led to an indictment or conviction. While a cooperation agreement that is contingent on indictments or successful prosecutions may sometimes heighten a witness's interest in the outcome of a proceeding, in most cases the witness will have revealed the nature of his evidence before the agreement is reached. As in the case of other types of testimony by interested persons, the possibility that the witness will provide false testimony in order to obtain benefits under a contingent agreement is best addressed by fully revealing the terms of the agreement to the defendant. Once defense counsel has thoroughly explored the terms of the agreement on cross-examination, the jury is in a position to scrutinize the witness's testimony with additional care.

Here the government fully disclosed the nature of its agreements with Gamst, and petitioner's counsel cross-examined Gamst rigorously about those agreements.[4] Moreover, there were substantial indications that Gamst's testimony was reliable. Both Gamst and another witness,

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[4]Both the district court (Aug. 17, 1983, Order, at 3-4) and the court of appeals panel (Pet. App. 10a) recognized that the government disclosed its arrangements with Gamst to petitioner's counsel and that the latter thoroughly explored those arrangements on cross-examination. See also page 4, *supra*.

Peggy O'Brien, clearly implicated petitioner in the arson-for-profit scheme during the *Lemm* investigation and trial, before the agreement at issue here was reached (see Gov't C.A. Br. 8, App. A, Exhs. 2-4).[5] Gamst's testimony at petitioner's trial was corroborated by several independent witnesses (see page 4, *supra*). The cooperation agreement did not specifically target petitioner; in fact, Gamst also implicated another co-conspirator, who subsequently pleaded guilty. Finally, Gamst indicated his willingness to cooperate in future prosecutions some six months before he entered into the post-sentencing cooperation agreement (see page 2, *supra*; I Tr. 303-304). In these circumstances, the trial court was unquestionably correct in leaving the determination of Gamst's credibility to a properly instructed jury.[6]

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[5]Petitioner errs in his assertion (Pet. 2, 3 n.1) that Gamst failed to incriminate petitioner during the *Lemm* proceedings. The court of appeals panel specifically recognized that "Gamst referred to [petitioner] in the earlier trial and stated that [petitioner], as a real estate agent, obtained houses for Gamst and others with the knowledge that the houses would be burned for insurance profit" (Pet. App. 12a).

We take issue with petitioner's claim that "[t]here can be no doubt" that Gamst testified falsely at petitioner's trial (Pet. 3). It is our belief that Gamst testified truthfully, as he was required to do under the cooperation agreement. See page 3, *supra*. As we discuss in the text, Gamst's testimony was corroborated in several important respects.

[6]At petitioner's trial, the court instructed the jury that it should consider the "apparent fairness or bias" of all witnesses (Jury Instruction 25) and that it should "weigh[] * * * with greater care," because of "self-interest or * * * prejudice," the testimony of an informer who provides evidence against a defendant for immunity from punishment or for personal advantage" (Jury Instruction 26). The court also instructed the jury that it could consider a witness's status as a convicted felon (Jury Instruction 28) and that it should "receive[] with caution and weigh[] with great care" the testimony of an accomplice (Jury Instruction 27).

At bottom, petitioner's claim rests on his belief that the government should not be permitted to enter into contingent cooperation agreements with witnesses. But "[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty." *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6 (footnote omitted). There is no constitutional basis for treating Gamst's testimony differently from that of any other interested witness.[7]

2. Petitioner also contends (Pet. 7-8) that it was improper for the en banc court of appeals to affirm by an equally divided vote when one active judge failed to participate in consideration of the case. It is not uncommon, however, for either this Court or the en banc courts of appeals to affirm judgments in cases involving criminal law issues by an equally divided vote. See, *e.g.*, *Ramirez* v. *Indiana*, No. 84-5059 (Apr. 1, 1985); *Oklahoma* v. *Castleberry*, No. 83-2126 (Apr. 1, 1985); *Fugate* v. *New Mexico*, No. 83-6663 (Mar. 26, 1985); *Green* v. *Zant*, No. 84-5609 (A-503) (Jan. 7, 1985) (denial of a stay of execution); *Koehler* v. *Engle*, No. 83-1 (Mar. 26, 1984); *Biggers* v. *Tennessee*, 390 U.S. 404 (1968); *United States* v. *Thompson*, 728 F.2d 654 (4th Cir. 1984), cert. denied, No. 83-6501 (Oct. 1, 1984); *United States* v. *Geders*, 585 F.2d 1303, 1305-1306 (5th Cir.

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[7]Petitioner's attempted analogy (Pet. 4-6) to unduly suggestive identification testimony is inapposite. Such testimony calls into question the witness's capacity to perceive and recall relevant events. Here there is no question concerning Gamst's capacity to perceive events in connection with the arson-for-profit scheme or to relate those events to the jury. See *United States* v. *Lightly*, 677 F.2d 1027, 1028 (4th Cir. 1982).

We note also our view that petitioner's challenge to the admissibility of Gamst's testimony could not properly be raised on collateral attack. All of the facts concerning the cooperation agreement were known at the time of the trial; thus, petitioner's due process claim could have been raised on direct appeal. See *United States* v. *Frady*, 456 U.S. 152, 165 (1982).

1978), cert. denied, 441 U.S. 922 (1979); *United States* v. *Clavey*, 578 F.2d 1219 (7th Cir.), cert. denied, 439 U.S. 954 (1978).

The fact that an active judge did not participate in the en banc resolution of this case does not call into question the disposition of the case. Compare, *e.g.*, *Ramirez* v. *Indiana, supra; Oklahoma* v. *Castleberry, supra; Fugate* v. *New Mexico, supra; Green* v. *Zant, supra; Koehler* v. *Engle, supra*. A majority of the en banc court voted to rehear the case en banc. While the judgment of the en banc court lacks precedential value because of the equally divided vote, it nevertheless was a conclusive adjudication as between the parties. See *Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910); *Berlin* v. *E.C. Publications, Inc.*, 329 F.2d 541, 545 n.3 (2d Cir.), cert. denied, 379 U.S. 822 (1964). Such a disposition presents no basis for review by this Court.[8]

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[8]Petitioner cites this Court's decision in *Briscoe* v. *Commonwealth Bank of Kentucky*, 33 U.S. (8 Pet.) 118 (1834), for the proposition that an appellate court has an obligation to reach a majority resolution of a case. However, *Briscoe* stated only that it was this Court's practice not to decide constitutional questions by less than a majority vote. *Id.* at 122. The court of appeals did not issue an opinion on a constitutional matter, but merely affirmed by means of a judgment order that lacks precedential value in future cases. Contrary to petitioner's contention, there is no requirement that courts of appeals entertain successive rehearing petitions merely because additional judges become available following the original en banc decision. See, *e.g.*, *United States* v. *Penn*, 647 F.2d 876, 889-890 (9th Cir. 1980). A court of appeals has broad discretion to determine how it will exercise its power with respect to petitions for rehearing en banc. See *United States* v. *American-Foreign Steamship Corp.*, 363 U.S. 685, 688 (1960); *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 250, 259 (1953). Here petitioner specifically requested that the en banc court reconsider his case with Chief Judge Lay participating, but the court denied that request (Pet. App. 16a), as it had discretion to do.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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